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IN THE

Supreme Court of the United States

October Term, 1943

No. 252

J. HOWELL FLOURNOY, Sheriff and Ex-officio Tax Collector,

Appellant,

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER and JACQUES L. WIENER,

Defendant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

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The Attorneys General of the States of California, Arizona, Idaho, Nevada, New Mexico, Texas and Washington, and the Oklahoma Tax Commission, pursuant to leave of the Court, file this brief as *amici curiae* in support of the decision of the Supreme Court of Louisiana, reported in 14 So. (2d) 475. In so doing they are acting in behalf of the people of their respective states, to whose interests and social polity the present cause is of vital concern.

The Question Presented.

Omitting formal matters sufficiently covered in other briefs on file, and assuming the Court's jurisdiction, we approach at once the problem of the validity of the 1942 amendment to Section 811(e) of the Internal Revenue Code (56 Stat. 941), by which there was included within a decedent's taxable estate, property

> "To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

Carrying forward the same concept, the 1942 Act added corresponding provisions relative to life insurance purchased with community funds (Sec. 811(g)(4), I. R. C., 56 Stat. 941); and to "gifts of property held as community" (Sec. 1000(d), I. R. C., 56 Stat. 952).

The Congressional Concept of Community Property.

The Report of the House Ways and Means Committee on the 1942 Act says (in part):[1]

> "For the purpose of Federal estate taxation, husband and wife living in community property States enjoy a preferential treatment over those living in non-community property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In non-community-property States, all such property is regarded as belonging entirely to the husband." (C. C. H. Inheritance, Estate and Gift Tax Service, 7th Ed., Par. 3448.50.)

After illustrating the results of this alleged "preferential treatment," the Report continues:

> "Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. * * *"

The Report of the Senate Finance Committee says the amendments "make due provision for the exclusion from the gross estate of that portion of the community property which is *economically attributable* to the survivor." (Emphasis supplied.)

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[1]On legislative history as an aid to construction, see *Harrison v. Northern Trust Co.*, 317 U. S. 476 (1943); *Riggs v. del Drago*, 317 U. S. 95, 98, 99 (1942); *Helvering v. Griffiths*, 318 U. S. 371, 378, *et seq.* (1943).

We note the House Committee's statement that in community property states, property acquired by the husband's efforts after marriage "is treated *as if* one-half belonged to the wife." With serenity and finality, the *as if* assumes that the wife's ownership is a fiction. The Senate Report, more considerate in form, carries the same implication. To whom, says the Senate, is the property "economically attributable"? The state law, through whose grace and under whose protection the property was acquired—which permitted the property to be held in private, rather than public ownership—deems it attributable to *both* spouses. But the Senate Committee, guided by an inner light, attributes the property to one spouse, presumably the husband.

Thus do Committees of Congress set at naught a system of property rights which was old when Congress itself came into existence; which is older than the common law, one of whose cruder concepts, the inferiority of women and their subordinate place in the social order, Congress has assumed as self-evident truth. In fact, Congress has assumed that concept as being endowed with such innate vigor and authority that the contrary concept is not merely inferior in force and effectiveness, but is nonexistent. The wife is treated, says Congress, *as if* she were a part owner. Immediately follows the Congressional concept of the true rule—the same yesterday, today and forever, which no legislature can effectively repeal or modify. Says the Committee, "In non-community-property States, all such property is regarded as belonging entirely to the husband."

Since property cannot belong *entirely* to one person without excluding the claims of all others, it is manifest

that a married woman, in *some* of the states, has no rights in property which Congress is bound to respect. The announcement by this Court that as a matter of historic fact, certain members of the human race had no rights which other men were bound to respect (*Dred Scott v. Sandford*, 19 How. 393, 407) played its part in bringing on a war. While we anticipate no such result in this case even though the decision be adverse to the community property states, we submit, in all deference to Congress and with the greatest respect, that its own comments condemn its handiwork. They show that Congress, deeming the community property laws a fictional device operating in impairment of the revenue, is reaching within the internal economy of the states to interfere with property rights not conforming to the Congressional idea of what is seemly—rights regarded in vast areas of our country, and by millions of people, as realities, not as fictions destructible at the will of Congress because Congress prefers the rule that "all such property is regarded as belonging entirely to the husband."

Congress, fleeing from what it regards as a fiction—that the wife can possibly be regarded as part owner of property acquired through cooperative endeavor in which she shares burdens and sacrifices—*embraces the most outmoded fiction of the common law*, namely, that husband and wife are one, and that one the husband.[2] It seems to us that in the best of all possible worlds, *equal* ownership of the spouses would be more likely to be regarded as consonant with natural justice than the concept, be-

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[2]The phrase is that of Holmes, J., dissenting in *Hooper v. Tax Commission*, 284 U. S. 206, 219.

loved of the common law and of Congress, that property acquired through the joint efforts of two persons must of necessity all belong to one. The apparent belief on the part of Congress that the wife's interest in community property is a delusion, hardly more than a pretense—that she is not the owner but is only treated *as if* she were—is, we submit, the result of a misconception of the nature of community property, its history, and the social policy which it exemplifies.

Origin of Community Property in America.

We have said that the community property system was old at the birth of the American Congress, which a century and a half later was to deny that the system had any substantial reality. That system had had at least a millenium of existence when stout Cortez (actually it was stout Balboa) stared at the Pacific, silent, upon a peak in Darien. In its origins, now lost in antiquity, it goes back to the beginning of law itself.

In its earlier forms, the family, not merely the spouses was the important property unit. (Jacobs, *Marital Property*, Encyclopaedia of the Social Sciences, Vol. 10, p. 117.) Traces of this system are found in the laws of ancient Egypt (Howe, *The Community of Acquests and Gains*, 12 Yale Law Journal 216 (1902)), of ancient Greece (Roby, *Twelve Tables of Gortyn*, 2 Law Quar. Rev. 135 (1886)), and of ancient Rome (Leage, *Roman Private Law*, 2d Ed., p. 103 *et seq.*; p. 198).

The Teutonic tribes recognized a form of marital community ownership at an early date (Huebner, History of Germanic Private Law, pp. 623, 627). De Funiak in his

recent work, Principles of Community Property, Vol. I, Sec. 11, p. 27, says:

> "The most logical explanation, that most largely borne out by the facts, is that the causes which make the wife the partner of the husband are economic in nature. It is among those races or among those classes of society in which the wife works shoulder to shoulder with the husband to maintain and preserve the common home and possessions, in which she contributes labor rather than the mere 'adornment' of her presence, that she is found to be the partner of her husband with an ownership in the acquests and gains of their common labor and struggles. Thus, it may be noticed that among some migratory and nomadic peoples, which lead a hard and dangerous existence, the wife shared with her husband its dangers and vicissitudes, she was fully cognizant of the details of and shared in his daily life and labor, she lingered on the edge of the battlefields to succor him from or to help him to despoil his enemies, she was side by side with him on dangerous migrations, and took equal part in his councils; among such races the wife was fully recognized as an equal partner. Such a race was that of the Visigoths and indeed most of the Germanic tribes, including the Angles and Saxons, among all of whom the community system was to be found in varying forms. These Germanic tribes did not have a complex form of society, with gradation of classes and its accompanying privileged or landed aristocracy. Their society was essentially democratic in nature."

These tribes, settling other parts of Europe, extended the community system. (Huebner, *supra*, p. 643.) Its origins in France are uncertain. (Brissaud, History of

French Private Law, p. 818.) Originally not accepted in Normandy (Brissaud, *supra*, p. 790), it eventually became the law of all France by the Code Napoleon.

The Visigoths introduced the community system into Spain where originally the husband and wife shared in the community to the extent of the contribution of each (*Fuero Juzgo*, Book 4, Title 2, Law 17), but later shared equally (*Fuero Real*, Book 3, Title 3, Law 1). This is the law today. (*Novisima Recopilacion*, Book 10, Title 4, Law 1).[3]

Among Britons, the idea of family ownership seems to have made little headway (Pollock & Maitland, *History of English Law*, 2d Ed., Vol. 2, p. 251). The authority just cited says (pp. 402, 403):

> "Our own law at an early time took a decisive step. It rejected the idea of community. So did its sister the law of Normandy, differing in this respect from almost every custom of the northern half of France. * * * In the first place, we have to remember that about the year 1200 our property law was cut in twain. The whole province of succession to movables was made over to the tribunals of the church. In the second place, we are told that in France the system of community first became definite in the lower strata of society. * * * We have often had occasion to remark that here in England the law for the great becomes the law for all. * * * In England, with its centralized justice, the habits of the great folk are more important than the habits of

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[3]The Spanish community property laws referred to in this brief will be found in the Appendices, Vol. 2, de Funiak, Principles of Community Property.

> the small. This has been so even in recent days. Modern statutes have now given to every married woman a power of dealing freely with her property and this was first evolved among the rich by means of marriage settlements."

In rejecting the community idea,[4] England plunged herself into archaic depths from which her married women extricated themselves only after centuries of endeavor, and even then found themselves in a less advantageous position than that accorded to them under the community system.

Naturally the conflict between the common law and the community system was transplanted to the North American continent, settled by French, Spanish and English. For generations prior to the English conquest of Canada in 1763, the people of that country had been living under French laws and customs (Howe, *Roman and Civil Law in America*, 16 Harv. Law Rev. 342, 345 (1903)). And those laws, as to marital property at least, still prevail in Quebec (*Beaudoin v. Trudel* [1937], I. Dom. L. R. 216).

By a charter granted in 1712 by the King of France (*Kaskaskia v. McClure*, 167 Ill. 23, 47 N. E. 72), the royal edicts and the *Coutume de Paris* (including, pre-

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[4]In place of a community interest, the common law gave the wife dower, always a flimsy, and with the decline of the economic importance of real property (see *Helvering v. Hallock*, 309 U. S. 106, 118), almost a fraudulent, device. Commenting on the efforts at improvement in this field made in various jurisdictions, Vernier, American Family Laws, Vol. III, p. 346, says: "The most pronounced reaction of the writer after having examined the statutes in this field is a feeling of disgust for the slipshod methods of lawmakers. * * * The statutes are filled with ancient matter which, coupled with piecemeal innovations, forms an inconsistent, ambiguous hodgepodge. In no field is there more evidence of haphazard, fragmentary legislation; and, in most jurisdictions, no field is more deserving of a complete renovation."

sumably, the community property system) became law in the Mississippi Valley and the central Gulf regions originally settled by France (de Funiak, Sec. 40). In 1769, by proclamation of Don Alexander O'Reilly, the French community system was supplanted by the Spanish. For a time prevalent in the east Gulf region, where Spanish law remained for a time in effect (*American Insurance Co. v. 356 Bales of Cotton*, 1 Pet. 511, 544; de Funiak, Sec. 44), the community system finally yielded to the common law in the east and central Gulf areas (see *Riddick v. Walsh*, 15 Mo. 519; de Funiak, Secs. 42, 44), save in Louisiana, where it appears to have been consistently adhered to.

The southwestern region was part of Spain's new world possessions, and by royal order in 1807, the *Novisima Recopilacion* of Spain was made applicable to these territories, thus establishing the community system. (Schmidt, *Civil Law of Spain and Mexico*, p. 99.) Gaining its independence from Spain in 1824, Mexico continued to recognize the community system and later incorporated it into its law. (Novisimo Sala Mexicano, Sec. 2a, Title 4, No. 1, quoted in de Funiak, Sec. 15, n; see Schmidt, *supra*, *Civil Law of Spain and Mexico*, Book 1, Title 1, Chapter IV, Sec. 1.) On obtaining its independence from Mexico in 1836, Texas retained its then existing system of marital property rights (de Funiak, Sec. 45). Of five states, California, New Mexico, Arizona, Nevada and Utah, carved out of territory acquired by the United States from Mexico, the two first named continued the community system without interruption; and Arizona and Nevada adopted it shortly after they had experimented briefly with common law doctrines (Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 Wash. Law

Rev. 1 (1936)). Early Mormon religious practice, more in accord with common law concepts of a wife's status and marital rights, led to the rejection of the community system in Utah (de Funiak, *supra*, Sec. 49, p. 104).

Of the Oregon Territory, the States of Washington and Idaho, after a period of experimentation with the common law, abandoned it in favor of the community system (Kirkwood, *supra*, pp. 6-8). Oklahoma, in 1939, and Oregon, in 1943, in an optional form and independently of pre-existing customs or traditions, adopted community property laws. (See Okla. Stat. Ann., Perm ed., Title 32, Sec. 51 *et seq.*; Ore. Laws 1943, Ch. 440.)

Tribal customs, crystallizing into written laws, and these transmitted to certain communities of the New World, which have in turn influenced their neighbors—these are the origins of community property in the United States. Varying in details which it would serve no present purpose to explore, the community property laws are alike in the respect that they confer upon the spouses property rights of equal dignity, constituting the husband the agent of the community for certain purposes. By reason of these similarities, it is possible to discuss the issues of the present case in a broad way, ignoring minor divergences.

Constitutional Questions Involved.

Why did Congress attach the *as if* stigma to the wife's interest in community property, ascribing to it a fictional character? The answer seems plain. To admit that the wife *is* an owner would cause Congress, by its own admission, to transgress three Constitutional limitations on its powers: (1) It would become a trespasser upon a field reserved to the states; (2) it would violate the Fifth Amendment; (3) it would violate the requirement of geographical uniformity.

I.

The 1942 Act Constitutes an Invasion of the Powers Reserved to the States.

In saying that Congress has no such power, we wish to go somewhat further than saying that the proposed act violates the Fifth Amendment—a point dealt with later. It constitutes an interference with state policy and economy. If a state says that the wife's contribution to community earnings is equal to the husband's, can it be said that such a view is so palpably erroneous that Congress may override it at will?

A present day writer states the social theory underlying the community property system:

> "* * * actually there is attached to the marriage a marital partnership based on the view that two individuals are equally devoting their lives and energies to furthering the material as well as the spiritual success of the marriage. The wife usually remains the home maker, the husband the bread winner, and because his share thus has to do with the earnings and properties acquired their management remains in his hands." (de Funiak, Principles of Community Property, Sec. 95, p. 265.)

Tersely, the Washington Court expresses the community concept: "He [the husband] is, so to speak only the head of a firm. The personal property is just as much hers as his." (*Marston v. Rue*, 92 Wash. 129, 131, 159 P. 111 (1916).)

See also quotation from Jacobs, p. 30, *infra*, and cases cited under heading, Nature of Wife's Interest in Community Property, p. 27, *infra*.

The community property states have created a system of property rights based upon the belief that accumulations of property, the product of industry, are attributable to the wife equally with the husband; or upon a policy which, regardless of the fact, ascribes to them a corresponding ownership. The belief may be erroneous. The policy may be attributed, flatteringly, to generosity to women, or less flatteringly to duress on their part. Whether the actuating motives are good or bad, Congress still may not interfere with the system merely because it looks strange to residents of other states and to lawyers schooled only in the common law.

The framers of the Constitution did not freeze into it common law property concepts. In fact the "feudal economy" is at the present time slightly in disrepute (*Helvering v. Hallock*, 309 U. S. 106, 118, 84 L. Ed. 604 (1940)). Property rights are a part of the vast sphere reserved to the states respectively or to the people under the Tenth Amendment. To say that property belongs entirely to the husband when the law under which it came into existence says one-half of it belongs to the wife, is to substitute a federal for a state system of property rights. To sustain Congress in derogating from property rights conferred by state law, putting them on an *as if* basis, destroying the substance and leaving only the shadow, is to substitute a federal for a state system of property rights.

This addition to the husband's rights, and this derogation from the wife's, go beyond the authority of Congress.

> "When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed not from the people of America but from the people of the several states;

and remain after the adoption of the constitution what they were before, except so far as they may be abridged by that instrument." (Marshall, C. J., in *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529, 548 (1819).)

"That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." (Marshall, C. J., in *Dartmouth College v. Woodward*, 4 Wheat. 518, 629, 4 L. Ed. 629, 657 (1819).)

Conceding, as it must be conceded, that the national government has "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end" (*United States v. Darby*, 312 U. S. 100, 124, 85 L. Ed. 609 (1941)), it is still sound constitutional doctrine that "the government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." (*United States v. Cruikshank*, 92 U. S. 542, 551, 23 L. Ed. 588, 591 (1876).) It is as true now as it was in John Marshall's day that the government is "one of enumerated powers." (Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. Ed. 579, 601 (1819).)[5]

Indisputable is the fact that the domain of property rights is reserved exclusively to the states.

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[5] See, also, *United States v. Butler*, 297 U. S. 1, 63, 80 L. Ed. 477, 487 (1936).

"The power of the State to limit the tenure of real property within her limits and the modes of its acquisition and transfer and the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. * * * The power of the State in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority." (Field, J., in *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192 (1877).)[6]

Without multiplying quotations, the following recognize or apply in one form or another the principle that the state is sovereign as to those matters which the Constitution commits to the Federal government:

Penoyer v. Neff, 95 U. S. 714, 722, 24 L. Ed. 565, 568 (1878);

Yonley v. Lavender, 88 U. S. 276, 22 L. Ed. 536 (1875);

Hopkins Federal Savings & Loan Association v. Cleary, 296 U. S. 315, 80 L. Ed. 251 (1935).

The same rule applies to another question incidentally arising here, namely, the subject of the relationship of husband and wife, which this Court has held "belongs to

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[6]On state law as governing possibility of revesting property or distribution of income, see *Helvering v. Stuart*, 317 U. S. 154, 161 (1942). State law determines upon whom local taxes are imposed. *Magruder v. Supplee*, 316 U. S. 394, 396 (1942).

the laws of the states and not to the laws of the United States." (*Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383, 74 L. Ed. 489 (1930).) A recent decision recognizes "property interests" as one of the "commanding problems in the field of domestic relations with which the state must deal." (*Williams v. North Carolina*, 317 U. S. 287, 298 (1942).)

In the 1942 Act, Congress is seeking to withdraw one of the incidents of the marital relationship from state control. If Congress, preferring the common law rule which regards property acquired during marriage "as belonging entirely to the husband," can establish a basis of taxation for property so owned, different from or more favorable than the basis where property so acquired belongs in part to the wife, then a wide gap has been opened in the line, hitherto deemed impregnable, between federal and state authority over property rights. If Congress can say that in one state a transfer of 100% is taxed on that basis, and that in another a transfer of 50% is taxed as though it were 100%, there is manifest discrimination: and if, going still further, Congress can say that a person (the wife) who has *no* interest in the property which Congress is willing to recognize is nevertheless taxed on the basis of owning 50%, there is manifest injustice. Is it probable that the community property states can withstand the pressure to go over to the system where taxation bears some relation to, and does not ignore, ownership? The retrogressive nature of such a move, and of a law which impairs or infringes upon the more enlightened and generous property system, will be referred to later. (See page 30, *infra*.)

Where the federal government attempts to invade a field of action reserved to the states, it is not important

that the attempted invasion is made under the guise of a taxing act. In *Linder v. United States*, 268 U. S. 5, 17, 69 L. Ed. 819, 823 (1925), the Court says:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced."[7]

When Congress, under the guise of a taxing act, ignores property rights attaching at the moment of acquisition and recognized in full vigor by state law, its acts are in derogation, almost in contempt, of the authority of the states. The Federal Estate Tax Act is concerned only with *transfers*—those transfers occurring at, made in contemplation of, or rendered fully effectual only by death. To say that the transfer of A's property to B at A's death is taxable, is undoubtedly within the power of Congress. To say, however, that A's title will be expanded or diminished according to the will of Congress, ignoring the state law which alone grants and governs the right to acquire and to own, is to permit Congress to set aside the laws of the several states and to regulate their internal economy to a degree which up to the present time has not been thought possible.

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[7]See also, *United States v. Butler*, 297 U. S. 1 at 69, 80 L. Ed. 477 (1936).

II.

The 1942 Act Contravenes the Fifth Amendment.

Without elaboration, since the point is fully discussed in the brief of other *amici curiae*, we say—and with apologies, for it is a truism—that one person's property cannot be included in another's estate for the purpose of assessing death duties. We shall defend later the premise involved in the above statement. (See *infra*, page 27.)

Referring to a state statute which in effect compelled one person to pay another's tax, the Supreme Court said in *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271 (1881):

> "And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger can not be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall if at all upon another."

Property which a decedent has owned but has effectually parted with during his lifetime may not be brought back into his estate for tax purposes by subsequently enacted laws. (*Nichols v. Coolidge*, 274 U. S. 531, 71 L. Ed. 1184 (1927; federal estate tax); *Coolidge v. Long*, 282 U. S. 582, 75 L. Ed. 562 (1931; state inheritance tax).) Property similarly parted with may not be brought back into the estate by laws establishing a conclusive presumption as to the motives attending its transfer. (*Schlesinger v. Wisconsin*, 270 U. S. 230, 70 L. Ed. 557 (1926; state statute); *Heiner v. Donnan*, 285 U. S. 312, 76 L. Ed. 772 (1932; Federal Estate Tax Act).)

The tax being on the interest which ceases at death (*Y. M. C. A. v. Davis*, 264 U. S. 47; *Edwards v. Slocum*, 264 U. S. 61; *Chase National Bank v. United States*, 278 U. S. 327), some substantial interest must cease at death to give rise to a taxable event. (See also authorities, page 21, *infra*.)

If, as *Heiner v. Donnan* points out, the value of a decedent's estate cannot be enhanced by the "fictitious inclusion" of property given away within two years prior to his death, with how much stronger reason may it be said that the estate cannot be enhanced by the fictitious inclusion of property which the decedent never owned at all.

The *Donnan* case condemns an attempt to measure a tax on one person's property by imputing to it in part the value of property of another, as "not taxation, but spoliation" (p. 327 of 285 U. S.). Of tax burdens distributed in accordance with another's wealth, the Court (quoting Judge Learned Hand in *Frew v. Bowers*, 12 F. 2d 625, 630), refers to the "grievous injustice" occasioned by that procedure.

Concerning an analogous question, that of the right to measure a husband's income by income belonging in part to his wife, the Supreme Court says in *Hoeper v. Tax Commission*, 284 U. S. 206, 76 L. Ed. 248 (1931), a case coming up from Wisconsin and involving its income tax law:

> "Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income but, in part, by that of another. To the problem thus stated, what was said in Knowlton v. Moore, 178 U. S. 41, 77, 44 L. Ed. 969, 984, 20 S. Ct. 747, is apposite:

"'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare Nichols v Coolidge, 274 U. S. 531, 540, 71 L. Ed. 1184, 1192; 52 A. L. R. 1081, 47 S. Ct. 710.)"

We are aware that Mr. Justice Holmes—Mr. Justice Brandeis and the present Chief Justice joining—dissented in the *Hoeper* case. That dissent, according to it the full weight which attaches to the opinions of that great man, detracts not at all from, indeed it supports, the authority of the majority decision as applied to the instant case. Mr. Justice Holmes was upholding the authority of the state legislature over a matter of state concern, as we are here. Differing from the majority, he thought the legislature could go back to a common law rule if it saw fit.[8] No

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[8] The Holmes philosophy of non-interference with state laws is well stated in his dissent in *Truax v. Corrigan*, 257 U. S. 312, 344.

conflict between state and federal authority over a state's internal concerns was involved. To reason that because Mr. Justice Holmes considered the state an agency competent to deal with its internal economy in that case, he would believe the federal government empowered in this to *overrule* that same agency, dealing with the same subject matter, seems lacking in coherence.

It is believed that the authorities cited above establish that a tax cannot be levied upon the property or estate of one person in respect of the property or estate of another; and that the inclusion of one person's *community* estate with another's for purposes of taxation falls within the condemnation of this just principle. The federal estate tax being levied on the "exercise of the privilege of directing the course of property after a man's death" (*Estate of Rogers v. Helvering*, 88 L. Ed. Adv. Ops. 148, 150), and that privilege being here non-existent, there is no subject matter to which the tax can apply.

III.

The 1942 Act Contravenes the Requirement That Excise Taxes Be Uniform. (Constitution, Article I, Section 8, Clause 1.)

This contention, raised often, but to this date without notable success, is founded upon the conviction that the uniformity clause was inserted for a purpose, and the belief that the instant case presents an unprecedented situation, favorable to its application.

The federal estate tax is an excise upon the privilege of passing property at death (*United States Trust Co. v. Helvering*, 307 U. S. 57; *Porter v. Commissioner*, 288,

U. S. 436). To bring the statute into operation, death must be the "generating source." (*Knowlton v. Moore*, 178 U. S. 41, 56). It must be "the source of valuable assurance passing from the dead to the living" (*Porter v. Commissioner*, 288 U. S. 436, 444). The subject matter of the excise is "the transfer of or shifting in relationships to property at death" (*United States Trust Co. v. Helvering*, 307 U. S. 57, 60).

It is true that this Court has said in *Poe v. Seaborn*, 282 U. S. 101, 117, as in other cases, that "differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity." In the instant case, differences of state law do not have to be read into the Act. Congress has itself read these differences into the Act by limiting the applicability of certain provisions to those states where the community system prevails.

So directed and limited, affecting only ten states, the 1942 Act does not operate with geographical uniformity in respect of the transfer of property. It is no answer to say that the statute applies in whatever states may now or hereafter come within the named category. Still undisposed of is the fact that the community relationship is singled out for special and discriminatory legislation not made applicable to other property relationships essentially indistinguishable from it, namely, separate ownership by spouses in non-community states, and marital partnerships. (See pages 27 to 29, *infra*.)

The language of this Court in *Knowlton v. Moore*, 178 U. S. 41, 89, 44 L. Ed. 969, 988, is applicable:

> "Giving to the term uniformity as applied to duties, imposts and excises a geographical significance like-

wise causes that provision to look to the forbidding of discrimination as between the states, by the levying of duties, imposts or excises upon a particular subject in one state and a different duty, impost or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes."

Discussing the same point, the Court (p. 84) states a contention of counsel respecting this matter which the opinion later upholds, as follows:

"* * * the words, 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say that wherever a subject is taxed anywhere the same must be taxed everywhere throughout the United States and at the same rate."

The 1942 Act does not make operative "the same plan and the same method * * * throughout the United States." Since, as pointed out above, essentially similar property relationships in non-community states go free, the 1942 act does not tax the same subject "everywhere throughout the United States." Since the method of taxation devised by the Act will result in including in the husband's estate property which he does not own, it will tax the transfer of property which he *does* own at a higher rate than would otherwise be applicable to him, and at a higher rate than would be applicable to the same

property in a non-community property state. The Act therefore does not tax the same subject "at the same rate." It does the very thing which this Court in the first extract above quoted says cannot be done, namely, it levies an excise "upon a particular subject in one state and a different duty, impost or excise on the same subject in another." In terms directed only at certain states—a feature which it is believed will not be found in any other excise statute—it is for that reason *prima facie* at variance with the requirement of geographical uniformity. But aside from this, it is at variance with that requirement for the further reason, not patent upon the face of the statute itself, that in determining whether transfers are subject to or free from taxation, it applies inconsistent and arbitrary and therefore ununiform rules.

Since, as pointed out above, it is the shifting of economic benefits, or the privilege of transfer which is taxed (*United States Trust Co. v. Helvering*, 307 U. S. 57; *Estate of Sanford v. Commissioner*, 308 U. S. 39, 43), it follows that if no benefits[9] (as to the wife's community half) are shifted at the husband's death, there is no subject matter upon which the tax can operate. Death is not the generating source of any new title. It has only

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[9]It is submitted that *substantial* benefits must be transmitted to give rise to the tax. Any other view would be inconsistent with this Court's intensely practical concept of taxation. See p. 47, brief of Bar and Taxpayers' Associations as *amici curiae*.

The necessity of "passing to the survivor substantial rights" is recognized even in *Tyler v. United States*, 281 U. S. 497, 503. We concur in comments on that case in the brief just mentioned, at p. 36 *et seq.*

removed one who stood in the relationship of a statutory agent in respect of the property (*Poe v. Seaborn*, 282 U. S. 101, 75 L. Ed. 239). As well might it be said that a principal is to be taxed at his agent's death, or a *cestui que* trust at the death of the trustee. Nowhere, save in the community property states, is a tax exacted from the beneficial owner upon the death of a person exercising only managerial powers over the owner's property[10]—non-beneficial powers which the legislature gave and can take away at will.

In thirty-eight states only that property is included in the taxable estate which was in some manner the decedent's, or over which he had a power of disposition deemed sufficient to give rise to the taxable event, the shifting of economic benefits, at his death. In ten states, under the 1942 Act, property is included as to which these indispensable conditions do not exist. This results in two inequalities, both violative of the uniformity requirement.

(1) Property not owned by the decedent and whose devolution he could not control is brought within his taxable estate.

(2) As a consequence, the property which is rightly included within his taxable estate is subjected to higher rates because of this wrongful inclusion.

It would be inaccurate to say that this is but another way of stating the argument based upon the Fifth Amendment, namely, that the property not being the decedent's

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[10]On the cessation of such powers as a non-taxable event, see *Estate of Williams*, 40 Nev. 241, 257, 161 P. 741, L. R. A. 1917C 602 (1916).

cannot be taxed at all.[11] The Act in question might run the gamut of the Fifth Amendment, and still fail in the uniformity test, because it singles out for taxation a property system—an incident, non-existent in the absence of the marital relationship—and says that property rights arising out of that system shall be subjected to a discriminatory burden. This denies uniformity, to the disadvantage of those communities of the Federal Union in whose legislative policy the rights discriminated against have originated.

In the interest of brevity, we concur in and adopt the discussion of discriminatory consequences and lack of uniformity appearing in the brief of the Bar and Taxpayers' Associations as *amici curiae*, at page 43 *et seq.*

By way of summary on this point: If a federal tax statute operates in such a manner that in a common law state it taxes in a husband's estate only the property which he owns or can dispose of, and in a community property state, it taxes in his estate not only property falling in those categories, but property which he does not own and cannot dispose of, its operation is not uniform. Failing to meet the tests prescribed in *Knowlton v. Moore* (see p. 22, *supra*), it is invalid.

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[11]In so far as the claims of the community property states are based only on unreasonable classification or inequality in the incidence of the tax, it seems that the Fifth Amendment affords them no remedy. *Helvering v. Lerner Stores Corp.*, 314 U. S. 463, 86 L. Ed. 343 (1941); *Hirabayashi v. United States*, 320 U. S. 81 (1943).

The Nature of the Wife's Interest in Community Property.

We have maintained throughout that the wife has an interest in community property coordinate and equal with that of her husband. We have referred to essentially similar marital property relationships which are accorded treatment more favorable than the 1942 Act accords to community property. These relationships are (1) separate ownership, and (2) ownership as partners.

(1) The Separate Ownership Analogy.

Elaboration of a point to which the Court is by no means a stranger, fully developed in the brief of other *amici curiae*, would contribute to its burdens rather than its enlightenment.

For convenience of reference we note certain authorities in this Court:

Warburton v. White, 176 U. S. 484, 44 L. Ed. 555 (1900; Washington);

Arnett v. Reade, 220 U. S. 311, 55 L. Ed. 477 (1911; N. M.);

Poe v. Seaborn, 282 U. S. 101, 75 L. Ed. 239 (1930; Wash.);

Goodell v. Koch, 282 U. S. 118, 75 L. Ed. 247 (1930; Ariz.);

Hopkins v. Bacon, 282 U. S. 122, 75 L. Ed. 249 (1930; Tex.);

Bender v. Pfaff, 282 U. S. 127, 75 L. Ed. 252 (1930; La.);

United States v. Malcolm, 282 U. S. 792, 75 L. Ed. 714 (1931; Calif.);

Lang v. Commissioner, 304 U. S. 264, 82 L. Ed. 1331, 118 A. L. R. 319 (1938; Wash.).

Other authorities are cited in the subjoined note.[12]

(2) The Partnership Analogy.

The substantial similarity between a marital partnership and the community relationship, often commented

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[12] *United States v. Goodyear*, 99 F. (2d) 523, 38-2 U. S. T. C. Par. 9532 (C. C. A. 9; Calif.);

Schwartz v. Schwartz, 52 Ariz. 105, 79 P. (2d) 501, 116 A. L. R. 633 (1938);

Siberell v. Siberell, 214 Cal. 767, 772, 7 P. (2d) 1003 (1932);

Bank of America N. T. & S. A. v. Mantz, 4 Cal. (2d) 322, 327, 49 P. (2d) 279 (1935);

Kohny v. Dunbar, 21 Ida. 258, 268, 39 L. R. A. (N. S.) 1107 (1912);

Radermacher v. Radermacher, 61 Ida. 261, 100 P. (2d) 955 (1940), citing earlier Idaho cases;

Estate of Williams, 40 Nev. 241, 161 P. 741, L. R. A. 1917C 602 (1916);

Baca v. Village of Belen, 30 N. M. 541, 240 P. 803 (1925);

Jenkins v. Huntsinger, 46 N. M. 168, 125 P. (2d) 327 (1942);

Arnold v. Leonard, 114 Tex. 535, 545, 273 S. W. 799 (1925);

McJunkin v. Republic National Bank, 131 S. W. (2d) 1085 (Tex. Civ. App., 1939);

Occidental Life Insurance Co. v. Powers, 192 Wash. 475, 74 P. (2d) 27, 114 A. L. R. 531 (1937), citing earlier Washington cases.

Re Coffey's Estate, 195 Wash. 379, 81 P. (2d) 283 (1938).

See also *de Funiak*, Sections 105, *et seq.*

on, is discussed in the brief of the Bar and Taxpayers' Associations, as *amici curiae*. (See pp. 45-47, 49.)[13]

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[13]The following additional citations are noted:

Bender v. Pfaff, 282 U. S. 127, 131, 75 L. Ed. 252 (1930);
Goodell v. Koch, 282 U. S. 118, 121, 75 L. Ed. 247 (1930);
Fuller v. Ferguson, 26 Cal. 546, 566 (1864);
Kohny v. Dunbar, 21 Idaho 258, 121 P. 544, 39 L. R. A. (N. S.) 1107 (1912);
Marston v. Rue, 92 Wash. 129, 159 P. 111 (1916);
de Funiak, Section 95.

On recognition of marital partnership for tax purposes, see:

MacPherson, 19 B. T. A. 651 (Mass.);
Kammerdiner, 25 B. T. A. 495 (Cal.);
Phelps, 13 B. T. A. 1298 (Va.);
Sidney Nathan, C. C. H. Dec. 13,192(M) (Tax Court, 1943);
W. W. Moyer, 35 B. T. A. 1155 (Pa.);
G. C. M. 3421, C. B. VII-1, p. 106;
S. M. 2964, C. B. IV-1, p. 171 (Colo.).

The above relate to income taxes. An estate tax case is *L. I. Fletcher Estate*, 44 B. T. A. 429 (1941; acq.).

Under the 1942 Act, voluntary marital partnerships, in non-community states, will occupy a status superior to marital partnerships, either voluntary or arising by operation of law, in community states. Aside from discrimination, the preference given voluntary associations over those enforced *in invitum* seems a curious transvaluation.

Tenancy in common. Some authorities suggest an analogy between community property and tenancy in common:

Warburton v. White, 176 U. S. 484, 496, 497 (1900; community property is common property);
Williams Estate, 40 Nev. 241, 260, 161 P. 741, L. R. A. 1917C 602 (1916).
Re Coffey's Estate, Note 11, *supra* (undivided one-half interest).

Interests held by tenants in common are severable for tax purposes. *Estate of Irwin A. Smith*, 45 B. T. A. 59 (1941; acq.); Reg. 105, Sec. 81.22 (1st par., last sentence).

There are irreconcilable differences between tenancy by the entireties and community ownership. See *de Funiak*, Sec. 134; see also pp. 36, *et seq.*, Bar and Taxpayers Associations' brief.

On the difficulties of describing community property in common law terms, see the opinion of the present Chief Justice while Attorney General, in 34 Ops. Atty. Gen. 395, 402, T. D. 3670 (1924).

Observations on the Significance of the Present Cause.

The present case involves, on its technical side, a conflict between state and federal authority—a conflict always important, but not new. On its human side, it involves the integrity of a system which has proved its social worth.

Not, as some Congressmen and an occasional law review or text writer supposes, an alien product, incomprehensible and of somewhat sinister design, the community system is the most widely accepted marital property system in the world (Lobingier, History of Conjugal Partnership, 63 Amer. Law Rev. 250, 280 (1929)). The ten American states that now embrace the system comprise 37.6% of the territorial area of the continental United States, excluding Alaska. In 1940, their inhabitants numbered 22,514,599, or 17% of the population of the United States (U. S. Dept. of Commerce, Sixteenth Census of the United States, Population, Vol. I, p. 14). Living within that area are some 17.5% (5,302,542) of the married men and 17.4% (5,255,953) of the married women in the United States (U. S. Dept. of Commerce, Sixteenth Census of the United States, *supra*, Vol. IV, Pt. 1, p. 160).

A commentator on the social sciences says:

> "The idea behind the community property system is on the whole a sound one, apart perhaps from the almost exclusive powers of management given to the husband. * * * It recognizes by law the equality between spouses in regard to property acquired during the marriage by the joint efforts of the parties * * * The community idea is in harmony with the present American conception of marriage, whereby

the relation between the spouses is regarded as a partnership, to which both contribute." (Jacobs, Marital Property, Encyclopaedia of the Social Sciences, Vol. 10, pp. 121, 122.)

"The whole trend of modern law and progressive custom is to regard the wife as an individual, personally and economically." (New Republic, July 14, 1941, p. 39.)

"The momentum of modern life flows in the direction of woman's progress. Any law that retards woman's advance would be fraught with grave social and political implications." (B. Fain Tucker, President Women's Bar Assoc. of Illinois; Women Lawyers' Journal, Apr. 1942.)

Without disparagement of this Court's record in any period of history, it may be said of its decisions in recent years that they uphold liberty, and that they are consistent with the ideal of social progress. Consistent with this ideal is the community concept that the freedom and equality into which the Declaration of Independence says men are born, applies both to men and women. Freedom cannot exist where there is economic servitude. Equality cannot exist where property acquired through the joint efforts of spouses "is regarded as belonging entirely to the husband" (House Comm. Rep., *supra*, p. 13); it cannot exist where the tax laws discriminate between the spouses.

By historical accident this cause comes before this Court at a time when women are doing their full share in the fields, in factories and homes, and in the auxiliary services, to keep the world a decent place for civilized men to live in; when not lingering "on the edge of the battlefields," as did the Visigoth women of the Fifth

Century (see *de Funiak*, page 7, *supra*, the women of Russia are *on* the battlefields, in combat with the common enemy. In such an atmosphere, a plea that Congress, invading state authority, can lawfully say that no attempt by a state to confer equal property rights on women is to be regarded as valid by the federal taxing power, seems particularly lacking in grace and timeliness.[14]

Erskine truly said that "no precedents can sanctify injustice"; but here precedents which might embarrass the Court in serving desirable ends are wanting.[15] Free to follow its judgment, the Court by its decision can mark a milestone in the path of social progress; or it can erect a memorial to a cause whose objectives were equality and justice. These objectives, we believe, constitute no source of embarrassment if, as so often occurs, the question becomes one of "drawing the line" (*Harrison v. Schaffner*, 312 U. S. 579, 583; *Irwin v. Gavit*, 268 U. S. 161, 168).

Conclusion.

In conclusion, we revert to the Congressional concept mentioned at the beginning (page 3, *supra*) to the effect that in non-community-property states, property acquired by the husband after marriage "through his own efforts" is regarded as belonging to the husband. Trans-

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[14]What has happened to the community property system of Germany under its present masters is uncertain. That it does not accord with their ideas of the function of women is suggested by *de Funiak*, Sec. 13, n. On the former German system, see *Hoffer v. Helvering*, 87 F. (2d) 328 (C. C. A. 2, 1937); *Eck v. Miller*, 8 F. (2d) 797 (App. D. C., 1925).

[15]There is here no "long period of accomodations to an older decision," requiring the Court "to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." *Helvering v. Griffiths*, 318 U. S. 371, 403 (1943).

later, this means that the husband is the beneficiary of his wife's "efforts" as well as of his own. Manifestly, such a system has its advantages to the male population. Since the converts to the community property system have been few, it seems that those advantages are deemed to outweigh certain differences between community and non-community states in respect of taxation. All the states can obtain the advantages, if any, of the community property system by adopting it. The remedy is in their own hands, and the price is willingness to forego the advantages which the common law gives the sex which, with hardy self-deception, believes itself dominant. In the absence of willingness to pay that price, it comes with ill grace for the non-community states, through their lawmaking power as constituting the majority, to enact legislation impairing the operation of the more equitable system.

If Congress can validly enact such legislation, a long step has been taken toward the obliteration of the autonomy of the states, and toward Congressional control over their institutions, customs, laws. In passing a measure having such an effect and tendency, we submit that Congress has misconceived and exceeded its authority.

Respectfully submitted.

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